In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-974

WEST PENN POWER COMPANY, PETITIONER

v.

RUSSELL TRAIN, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a to 42a) is reported at 522 F.2d 302. The opinion of the district court (Pet. App. 43a to 59a) is reported at 378 F. Supp. 941.

JURISDICTION

The judgment of the court of appeals was entered on July 16, 1975, and a timely petition for rehear-

ing was denied on August 15, 1975. On October 31, 1975, Mr. Justice Brennan extended the time in which to file a petition for a writ of certiorari to and including January 12, 1976. The petition was filed on January 9, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Administrator of the Environmental Protection Agency has the authority to disapprove a variance to a State's clean air implementation plan granted by state officials.

2. Whether Section 10 of the Administrative Procedure Act grants subject-matter jurisdiction to the district courts to review agency action.

3. If it does, whether the issuance of a notice of violation is reviewable under the Administrative Procedure Act.

STATEMENT

On September 13, 1973, pursuant to Section 113 (a)(1) of the Clean Air Act, as amended, 42 U.S.C. 1857c-8(a)(1), the Administrator of the Environmental Protection Agency sent petitioner a notice that Boiler No. 33 at petitioner's Mitchell Power Station was in violation of the regulations of the Pennsylvania air quality implementation plan limiting emissions of sulfur dioxide and particulates (Pet. App. 3a to 5a). Petitioner filed suit in the district court, seeking an injunction and declaratory judgment against this notice of violation. It argued that

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the Pennsylvania plan should have permitted the use of tall stacks as a method of meeting the sulfur dioxide restrictions in the plan.[1] It also contended that federal enforcement of the Pennsylvania implementation plan should be barred because petitioner had been granted a temporary variance by the Pennsylvania Department of Environmental Resources (Pet. App. 5a, 43a to 44a).[2]

The district court dismissed the action for lack of jurisdiction. It held that, insofar as petitioner was attacking the Pennsylvania plan, it had waived its right to review in the federal courts by not filing a timely petition to review the Environmental Protec-

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[1] The plan's imposition of emission limitations for sulfur dioxide required petitioner either to install pollution control equipment ("scrubbers") on its stacks or to use low-sulfur fuel. Two courts have held that the use of tall stacks alone is insufficient to comply with the emission limitations of a state implementation plan. *Big River Electric Corp.* v. *Environmental Protection Agency*, 523 F.2d 16 (C.A. 6), certiorari denied, No. 75-774, April 19, 1976; *Kennecott Copper Corp.* v. *Train*, 526 F.2d 1149 (C.A. 9), certiorari denied, No. 75-1029, April 19, 1976.

[2] On September 19, 1973, the Pennsylvania Department of Environmental Resources granted petitioner a temporary variance, which extended the compliance deadline for emission of sulfur compounds from Boiler No. 33 to June 30, 1976, while requiring the installation of flue gas desulfurization equipment (a scrubber) or conversion to low-sulfur fuel. This variance has not been approved by the Environmental Protection Agency, because the variance extended beyond July 31, 1975, the date for attainment of the primary ambient air quality standard for sulfur oxides (Pet. App. 5a). See 40 C.F.R. 51.15(b)(1); *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60.

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tion Agency's approval of the plan. It also held that the state-granted variance was ineffective to bar federal enforcement of the implementation plan because Section 110(a)(3) of the Act, as amended, 42 U.S.C. 1857c-5(a)(3), provides that variances must be submitted by the Governor of the State to, and approved by, the Environmental Protection Agency.

A divided court of appeals affirmed, although on different grounds. The court concluded that petitioner was not attacking the implementation plan itself, and so review was not affirmatively precluded. On the other hand, the court held that there was no jurisdictional basis for petitioner's suit against the Administrator's issuance of a notice of violation. Petitioner's arguments could be raised, the court held, as a defense to any judicial proceedings that the Administrator might commence to obtain compliance with the implementation plan.

On March 20, 1975, prior to the court of appeals' decision, petitioner filed a petition for review of the Pennsylvania implementation plan relating to the control of the emissions of sulfur dioxide at its Mitchell Power Station. On May 19, 1975, the court of appeals entered a stay of federal enforcement pending its resolution of the issues raised in the petition for review. The court of appeals has not yet decided the case, and its stay of enforcement remains outstanding.

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ARGUMENT

1. Petitioner contends that the Court should grant review in order to decide the question whether a state-granted variance, without federal approval of the variance, is sufficient to bar federal enforcement of an implementation plan. But the Court already has resolved that question in *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60, 93, which pointed out that the Administrator is entitled to review state-granted variances to ensure compliance with the national primary ambient air standards. The court of appeals relied on that decision in ruling that a state-granted variance is not effective to prevent federal enforcement of the plan's provisions unless the variance is approved by the Environmental Protection Agency, pursuant to Section 110 (a)(3) of the Clean Air Act, 42 U.S.C. 1857c-5(a)(3). See Pet. App. 5a, 14a, n. 28. The statute is clear; there is no conflict among the circuits and no reason for review by this Court.

2. Petitioner contends that the Court should resolve the conflict among the circuits on the question whether Section 10 of the Administrative Procedure Act, 5 U.S.C. 704, grants subject-matter jurisdiction to the district courts to review agency action. We agree with petitioner that this conflict should be resolved, and the Court granted on June 1, 1976, our petition in *Mathews* v. *Sanders*, No. 75-1443, which presents this issue. We submit, however, that it is not necessary to defer disposition of this case

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pending the Court's decision in *Sanders*, for there is no subject-matter jurisdiction over petitioner's claims whether or not the Administrative Procedure Act is a grant of jurisdiction.

3. Assuming *arguendo* that the Administrative Procedure Act contains a grant of subject-matter jurisdiction, the court of appeals correctly held that judicial review is nevertheless not available to petitioner because [3] the issuance of a notice of violation is not a final action subject to review (Pet. App. 16a to 18a). This basis for the court's decision is supported by settled principles and does not warrant further review.

The issuance of a notice of violation is simply the first step in an administrative decision-making process. It is, in effect, a decision to "charge" that a violation has occurred, and is no more a "final" decision than is a prosecutor's information or the decision of the Federal Trade Commission to issue a proposed complaint. It is the beginning of the administrative process, not the end. The court of appeals correctly observed (Pet. App. 17a to 18a):

> Under the statutory plan, the notice of violation is not "final agency action" since it may be followed by either (1) an order which "may" be issued 30 days after the notice, 42 U.S.C. § 1857c-8(a)(1), but "shall not take effect until the person to whom it is issued has had an

[3] The court also said that the Administrator's decision to issue a notice of violation is a discretionary action and therefore unreviewable. But cf. *Dunlop* v. *Bachowski*, 421 U.S. 560.

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> opportunity to confer with the Administrator concerning the alleged violation," 42 U.S.C. § 1857c-8(a)(4), or (2) a civil suit under 42 U.S.C. § 1857c-8(b), referred to above. The statutory scheme contemplates that the violation notice itself has neither an independent coercive effect nor "the force of law." *Columbia Broadcasting System* v. *United States*, 316 U.S. 407, 418 (1942). The notice bears no resemblance to the Food and Drug Administration regulations which were found reviewable in *Abbott Laboratories* [v. *Gardner*, 387 U.S. 136] and *Garner* v. *Toilet Goods Association*, 387 U.S. 167 (1967). The Court characterized the regulations challenged in *Abbott* and *Toilet Goods* as "formal," "definitive," "effective upon publication" and "self-executing." 387 U.S. at 151, 171. * * * By contrast, the only effect of a notice of violation is to make the recipient aware that the "definitive" regulations are not being met and to trigger the statutory mechanism for informal accommodation which precedes any formal enforcement measures. Of course, the plan's emission standards themselves *are* analogous to the regulations reviewed in *Abbott Laboratories*, but those regulations are not challenged on this appeal.

In short, the issuance of a notice of violation simply begins the administrative process. It imposes no coercive sanction, and it is subject to further administrative review before enforcement proceedings can be commenced in court. Petitioner's proper recourse is to make, in an enforcement action, the substantive arguments it has attempted to make here.

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Accord: *Federal Trade Commission* v. *Claire Furnace Co.*, 274 U.S. 160, 173-175; *St. Regis Paper Co.* v. *United States*, 368 U.S. 208, 225-227; *Reisman* v. *Caplin*, 375 U.S. 440, 445-450.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JUNE 1976.

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